IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL GEORGE,

Defendant.

OPINION AND ORDER

10-cr-84-bbc

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On March 18, 2013, more than two years after he was sentenced, defendant Michael George filed a "Petition to File a Late Motion pursuant to 28 U.S.C. § 2255." The petition was not accompanied by a motion. In the normal course of events, defendant would have had one year after his conviction became final in which to file a § 2255 motion for post conviction relief. Since he did not take an appeal, that year would have run by November 13, 2011, one year and ten days after his conviction became final. In an order entered on March 25, 2013, I gave defendant an opportunity to make a showing that he could not have filed a timely motion, even exercising due diligence. He has responded, but has failed to show that he qualifies for an extension of time.

Defendant is proceeding under subsection (4) of § 2255(f), which tolls the start of the one-year period in which to file a § 2255 motion to "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise

of due diligence." He alleged in his petition that he had asked his court-appointed counsel after sentencing to file an appeal of his sentence and had thereafter called him a number of times and written to him about the status of his appeal but that he had not learned until "a year later" that no appeal had been filed. Petition, dkt. #53.

Defendant was sentenced in this court on November 2, 2010. He avers in his affidavit, dkt. #55, that he made weekly calls to his attorney after sentencing while he was in the Columbia County jail but never learned the status of his appeal; he arrived at the Federal Correction Institution in Englewood in May 2011 and wrote counsel at that time but never received a response to his letter; and in October 2012, a friend of his called his attorney and learned for the first time that no appeal had been filed. He argues that his actions show that he wanted to appeal and fully expected that an appeal would be filed on his behalf. The question is whether his telephone calls and one letter demonstrated due diligence under § 2255(f)(4).

A similar question was before the court of appeals in Ryan v. United States, 657 F.3d 604 (7th Cir. 2011). Defendant Ryan had filed a § 2255 motion more than a year after his conviction had become final and had sought leave to file an untimely motion, saying that counsel had not followed his instructions to appeal, even though he had asked him about it at sentencing. Ryan argued that the statute of limitations under § 2255(f)(4) did not start running until two months after he was sentenced because a reasonably diligent defendant would not have known earlier that his attorney had failed to file an appeal.

The court of appeals identified the question raised by the defendant as "how long a

duly diligent prisoner would take to discover that his lawyer had not filed a notice of appeal." Id. at 607. It concluded that the answer was a factual one: two months might be long enough in some situations but not in others. The answer would depend on what the defendant knew about appealing, whether he used the mail or the telephone, how promptly his lawyer or the court responded to his inquiries and other factors.

In this case, defendant made a number of telephone calls to his counsel before he was transferred to the prison at Englewood in May 2011 and wrote one letter to counsel soon after arriving. For the next 17 months, he did nothing. Assuming that defendant made weekly calls to counsel until his transfer, counsel's failure to respond to the calls should have caused defendant to think that something was amiss and seek an answer from the court well before he left the Columbia County jail. As far as his affidavit shows, when his letter from Englewood was not answered, he simply ceased any effort to find out about the appeal. He did not write the court or the Federal Defender or take any other step to learn the status of his appeal. It was only when a friend called defendant's lawyer 17 months later that defendant learned that no appeal had been filed. Although defendant says that he knew that appeals take a long time, his showing falls far short of establishing that he exercised due diligence to learn whether an appeal had been filed on his behalf. It is nothing like Ryan, in which the court held that a reasonable prisoner may take at least two months and perhaps longer to suspect that counsel has dropped the ball, contact counsel or the court, wait for a response and verify his suspicion. Id.

In the six months between his sentencing and his arrival at Englewood, defendant had

good reason to think that his counsel had dropped the ball. He had received no answer to any of his calls, which was suspicious in itself. When his May 2011 letter went unanswered, he should have realized he would have to consult another source to check on his appeal. Instead, he did nothing. He did not write or call the court, although that would have been a reasonable response to his counsel's lack of communication. In short, he did not exercise any diligence, let alone enough to toll the start of the limitations period for 17 months until a friend learned from defendant's counsel that no appeal had been filed.

ORDER

IT IS ORDERED that defendant Michael George's "Petition to File a Late Motion pursuant to 28 U.S.C. § 2255" is DENIED.

Entered this 25th day of April, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge